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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 ABRAM RODRIQUEZ,

12 Plaintiff,

13 vs.

14 INTERNATIONAL LONGSHORE AND
15 WAREHOUSE UNION LOCAL 29;
16 INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION; and PACIFIC
MARITIME ASSOCIATION,

17 Defendants.
18

**CASE NO. 08-CV-00433-H
(BLM)**

**ORDER GRANTING
DEFENDANTS ILWU & LOCAL
29'S MOTION FOR SUMMARY
JUDGMENT**

19 On March 7, 2008, Plaintiff Abram Rodriguez initiated this action against Defendants
20 International Longshore and Warehouse Union Local 29, International Longshore and
21 Warehouse Union, and Pacific Maritime Association for violating his rights as a member of
22 a labor organization. (Doc. No. 1.) On September 19, 2008, Plaintiff filed an amended
23 complaint. (Doc. No. 21.) On July 13, 2009, Defendants International Longshore and
24 Warehouse Union Local 29 ("Local 29") and International Longshore and Warehouse Union
25 ("ILWU") filed a motion for summary judgment. (Doc. Nos. 41-42.) Plaintiff filed a response
26 in opposition on August 3, 2009. (Doc. No. 51.) On August 10, 2009, Defendants Local 29
27 and ILWU filed a reply. (Doc. No. 54.) The Court held a hearing on the matter on August 17,
28 2009. Derek Anderson appeared on behalf of Plaintiff. Dennis Hayes and Robert Remar

1 appeared on behalf of Local 29 and ILWU.

2 The Court, for the reasons set forth below, grants Defendant Local 29 and ILWU's
3 motion for summary judgment.

4 **Background**

5 Plaintiff Abram Rodriguez brought this action against Defendants International
6 Longshore and Warehouse Union Local 29 ("Local 29") and International Longshore and
7 Warehouse Union ("ILWU") for: (1) violation of 29 U.S.C. §§ 412 and 529; (2) violation of
8 29 U.S.C. §§ 411 and 529; (3) violation of 29 U.S.C. §§ 411 and 412; (4) violation of 29
9 U.S.C. §§ 481 and 482; (5) breach of contract; (6) breach of covenant of good faith and fair
10 dealing; (7) tortious interference with economic relations; (8) discrimination based on age; (9)
11 retaliation in employment; and (10) breach of collective bargaining agreement. (Doc. No. 21,
12 First Amended Complaint ("FAC").) Plaintiff's claims arise from his tenure and recall as
13 President of Local 29 and from his appointment to and removal from the super cargo dispatch
14 list.

15 Plaintiff is a marine clerk employed on the waterfront at the Port of San Diego, a former
16 Union Officer, and a registered member of Defendant Local 29. (FAC ¶¶ 4-5; Doc. No. 42,
17 Remar Decl. Ex. A, A. Rodriguez Depo 16:20-17:21.) Local 29 is a collective bargaining
18 representative for longshore workers who work primarily in the Port of San Diego and acts as
19 the authorized agent of its members with respect to union elections, registration, hiring,
20 dispatch, and discipline of its members. (FAC ¶ 5.) ILWU is the parent organization for all
21 longshore locals in California, Oregon, and Washington. (*Id.* ¶ 6.) PMA acts as the payroll
22 agent and collective bargaining representative for the stevedoring companies, terminal
23 operators, and shipping companies that employ waterfront workers at ports in California,
24 Oregon, and Washington. (*Id.* ¶ 7.)

25 The terms and conditions of longshore and marine clerk work in all ports on the Pacific
26 Coast are governed by a collective bargaining agreement ("CBA") between the ILWU and its
27 locals and PMA, on behalf of its member-companies. The CBA consists of the Pacific Coast
28 Longshore Contract Document ("PCLCD"), which governs the terms and conditions of

1 employment for longshore workers employed by PMA member companies and the Pacific
 2 Coast Clerk's Contract Document ("PCCCD"), which governs the terms and conditions of
 3 employment for marine clerks employed by PMA member companies. Together these
 4 documents comprise the Pacific Coast Longshore and Clerks Agreement ("PCL&CA").¹
 5 (Doc. No. 42, Remar Decl. Ex. B, McEllrath Depo. 51:20-23, 52:9-12.) When in their own
 6 membership governance, marine clerks follow the rules of Local 29's Constitution and bylaws.
 7 (Id. 52:13-16.) The Joint Port Labor Relations Committee ("JPLRC") is a joint labor-
 8 management committee composed of representatives of the waterfront employers and the
 9 ILWU locals at that specific port. Each JPLRC is responsible for administering the CBA at
 10 the local port level, which includes processing workers for registration, requiring workers to
 11 follow collectively bargained rules and procedures, and resolving grievances and employer
 12 complaints. On the JPLRC, the employers are represented by the LRC representatives with
 13 PMA as the employer chair. The Union is represented by a designated officer or representative
 14 to the respective JPLRC.

15 **1. Election and Recall of Plaintiff as Local 29 President**

16 In June 2007, Plaintiff was elected president of Local 29 and assumed the office on July
 17 1, 2007. (FAC ¶ 9; Doc. No. 51 A. Rodriguez Decl. ¶ 1.) Approximately two months after
 18 Plaintiff took office, several members complained at a Local 29 membership meeting that the
 19 local dispatch rules were not being followed. (Doc. No. 42 Remar Decl. Ex. A, A. Rodriguez
 20 Depo. 39:1-40:12.) The nature of the members' complaints was that workers were being
 21 permitted to take multiple shifts in a row, which reduced the work opportunity of other
 22 workers. (Id. 40:19-41:8.) The membership at this meeting voted to enforce the 1987 dispatch
 23 rules. (Id. 44:23-45:3.) The day following the meeting, Plaintiff informed Local 29 dispatcher
 24 Anthony Soniga to enforce the 1987 dispatch rules, which would stop the practice of triple
 25 backs and allow workers to take only two shifts in a row. (Id. 48:3-50:23.) Disallowing
 26 workers to take more than two shifts in a row changed dispatch procedures that had been in
 27

28 ¹Defendants cite to various sections of the PCL&CA throughout their papers, but have not submitted the document to the Court.

1 place for approximately ten years. (Id. 41:19-42:5.)

2 At a November 5, 2007 JPLRC meeting, PMA sought Local 29's agreement to
3 temporarily bring in 30 longshore workers and 10 foremen from the Port of Los Angeles/Long
4 Beach, due to an expected increase in cargo volume. (Id. 61:22-64:6, Ex. 4.) Local 29 agreed
5 to PMA's proposal and agreed that class A longshore travelers would be honored as such and
6 that all other travelers would be considered volunteer travelers and dispatched after the ID
7 board. (Id., Ex. 4.) On November 12, 2007, Plaintiff was confronted by members of Local 29's
8 executive board who complained that the longshore workers registered outside the Port of San
9 Diego were being rotated with San Diego Class A workers and dispatched ahead of San Diego
10 Class B workers. (Id. 73-76.) Plaintiff testified that at this meeting Local 29 member Joe
11 Vinole threatened him physically and that Vinole made similar threats in the following days.
12 (Id. 77-83.) Plaintiff filed a union complaint regarding these incidents on November 25, 2007.
13 (Id., Ex. 5.) On November 14, 2007, a special executive board meeting was called by the
14 executive board members and the LRC committee regarding the rotation of the visitors and
15 Plaintiff's failure to bring the matter before the executive board, the LRC committee and the
16 members before the November 5, 2007 JPLRC meeting. (Id. 151:13-152:5.) Plaintiff testified
17 that he stated at this meeting that everyone that was needed from the Local 29 was present at
18 the November 5, 2007 JPLRC meeting and that all had agreed that the visitors would rotate
19 with the locals for foremans and skilled jobs. (Id. 152:9-153:12.)

20 At a membership meeting on December 11, 2007, Plaintiff was presented with a recall
21 petition signed by 49 Local 29 members. (Id. Ex. 6.) Brian Whatley read the charges against
22 Plaintiff from the recall petition and four or five members yelled at Plaintiff to vacate his chair
23 as president and physically approached Plaintiff. (Id. 96-101.) Plaintiff refused to step down,
24 tried to regain order of the meeting, but the meeting deteriorated into chaos. (Id. 101-03.)
25 Plaintiff filed a union complaint on December 17, 2007, regarding the events of the December
26 11, 2007 meeting. (Id. Ex. 5.) Local 29 Vice President William Silva announced to the
27 membership in a December 22, 2007 letter that Plaintiff would have an opportunity to present
28 his case to the membership on January 8, 2008 and that the recall vote would occur on January
11, 2008. (Id. 187-88, Ex. 12.) Plaintiff was given twenty minutes to address the membership,

1 he used all twenty minutes, and then was told to leave the meeting. (Id. 188:13-22.) Plaintiff
2 was interrupted mid-sentence and informed the officials that he was just getting started and
3 needed to give his defense. (Id. 189:2-25; Doc. No. 51, Mendoza Decl. ¶ 8, Villanueva Decl.
4 ¶ 11, Luna Decl. ¶ 9.) The recall election took place on January 11, 2008 and Plaintiff was
5 recalled by a vote of 61 to 29. (Doc. No. 42 Remar Decl. Ex. C, Whatley Depo. Ex.11.)

6 Plaintiff wrote to the President of ILWU, Robert McEllrath, on December 14, 2007,
7 complaining about the recall petition and alleging various internal problems at Local 29. (Doc.
8 No. 42, A. Rodriguez Depo. 129-30, Ex. 10.) McEllrath responded to Plaintiff's letter by
9 writing to the officers and executive board members of Local 29, requesting information
10 regarding Plaintiff's accusations. (Id. 186, Ex. 11.) However, during McEllrath's
11 investigation, it came to his attention that Plaintiff was believed to have a criminal conviction
12 that prevented him from holding union office. (Id., Ex. 15.)

13 On June 27, 1994, Plaintiff was convicted under 18 U.S.C. §§ 371 and 1546 for
14 conspiracy to make false statements in visa applications in the United States District Court for
15 the Southern District of California. (Doc. No. 42, A. Rodriguez Depo. Ex. 27.) Plaintiff pled
16 guilty to a charge of conspiring "to assist undocumented aliens in presenting and subscribing
17 as true, false statements with respect to material facts on . . . Applications for Status as Special
18 Immigrant Religious Workers." (Id. Ex. 28.) Plaintiff was sentenced to eight months in
19 prison, beginning July 11, 1994, and one year of supervised release following the end of his
20 prison term. (Id. Ex. 27.) He served four months in federal prison and an additional four
21 months in a community confinement center. (Id. 13-16, Ex. 28.) Plaintiff was released from
22 federal custody in March 1995. (Id. 18.)

23 After McEllrath directed Local 29 to advise him and Local 29 members on Local 29's
24 position on Plaintiff's criminal conviction, and after Plaintiff's counsel refused to confirm or
25 deny Plaintiff's conviction, Local 29 and ILWU concluded that Plaintiff was convicted of a
26 felony in 1994, sentenced to confinement until March 1995, and was therefore ineligible to
27 serve in union office when he was elected in 2007. (Id. Exs. 15 & 16; Remar Decl. ¶ 5, Ex.
28 D; McEllrath Depo. 117-20.) ILWU therefore ceased to investigate Plaintiff's allegations
regarding the recall election because McEllrath determined Plaintiff was in violation of § 504

of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 504.² (Id., McEllrath Depo. 117-20.)

2. Appointment and Removal of Plaintiff from the Super Cargo Dispatch List

On June 27, 2007, Local 29 made a request to the Joint Clerks' LRC that the three most senior marine clerks in Local 29 be given super cargo status and added to the super cargo list. (Doc. No. 42, A. Rodriguez Depo. 268:1-10; Doc. No. 51, Anderson Decl. Ex. A, V. Rodriguez Depo. 40-41, Ex. B, Peterson Depo. 39.) A marine clerk with super cargo status gets priority dispatch for super cargo jobs and, if no super cargo jobs are available, those with super cargo status get first choice in dispatch for any remaining clerk jobs. (Doc. No. 42, A. Rodriguez Depo., Ex. 1.) Vernon Rodriguez, Plaintiff's brother, was the only Local 29 representative present at the meeting and he was the Union member who made the request on behalf of Local 29. (Id., A. Rodriguez Depo. 206:4-207:13, Ex. 18; Doc. No. 51, Peterson Depo. 39.) No action was taken at that time on the request, pending additional information from the Union regarding the three individuals the Union wanted to be added to the super cargo list. (Id., Peterson Depo. 53-54.)

Plaintiff was elected president of Local 29 in June 2007, assumed the office on July 1, 2009, and as such became an authorized Union representative to the respective JPLRC meetings held in San Diego. (FAC ¶ 9.) In the months following Local 29's initial request to add three marine clerks to the super cargo list, PMA investigated and found no past minutes of any Joint Clerks' LRC or any personnel information concerning the method that Local 29 historically used to add super cargoes. (Doc. No. 51, Peterson Depo. 53-54.)

At the September 26, 2007 Joint Clerks' LRC meeting, Plaintiff and Vernon Rodriguez represented the Union and Tim Peterson represented PMA. (Doc. No. 42, A. Rodriguez Depo. Ex. 19.) Peterson testified that he had done research to try to determine the past practices of

² Section 504 states that "no person . . . who has been convicted of . . . robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill assault which inflicts grievous bodily injury . . . shall serve or be permitted to serve— . . . (2) as an officer . . . of any labor organization . . . during or for the period of thirteen years after such conviction or after the end of such imprisonment, whichever is later." 29 U.S.C. § 504(a).

1 Local 29 and that he had not found anything to indicate that Local 29 had required additional
2 super cargo training and testing in the past in order for a clerk to be added to the super cargo
3 list. (Doc. No. 51, Peterson Depo. 53-54.) Because Peterson could determine no past practice,
4 he brought with him payroll, training and work history information for each of the
5 approximately 15 or 16 marine clerks in the unit in order for the Committee to determine
6 which three clerks to add to the super cargo list according to seniority as determined by several
7 factors. (Id., Peterson Depo. 57-61; Doc. No. 42, A. Rodriguez Depo. Ex. 19.) Based on the
8 information, the Joint Clerks' LRC concluded that the three most senior clerks to be added to
9 the super cargo list pursuant to Local 29's request were Plaintiff, Vernon Rodriguez, and Eddie
10 Flores. (Id.; Doc. No. 51, Peterson Depo. 60-62.)

11 Noel Carlisle, another marine clerk, filed a union complaint against PMA and Tim
12 Peterson in January 2008 alleging improper dispatch for allowing Plaintiff, Vernon Rodriguez
13 and Eddie Flores to be dispatched as super cargoes without having completed the super cargo
14 testing and training first. (Id., A. Rodriguez Decl. ¶ 16; Peterson Depo. 69-70; Doc. No. 42,
15 A. Rodriguez Depo. Ex. 20.) The issue of this complaint was raised at the February and March
16 2008 Joint Clerks' LRC. At the March 19, 2008 Joint Clerks' LRC meeting, Local 29
17 demanded that the three clerks be removed from the super cargo list and presented two letters
18 certifying that two of the current super cargo clerks had passed the super cargo examination
19 prior to being given super cargo status. (Doc. No. 42, A. Rodriguez Depo. Ex. 21.) The
20 employers, through PMA, initially took the position that the super cargo list should remain
21 intact and that any future additions to the super cargo list would have to go to super cargo
22 training and testing. (Doc. No. 51, Peterson Depo. 90-91.)

23 The employers and the Union eventually resolved the dispute with an agreement that
24 the clerks currently on the super cargo list would remain on the list, but would be required to
25 sign up for, take, and pass the upcoming super cargo training to remain on the list and that any
26 clerks seeking super cargo status in the future would have to take and pass the training and test
27 prior to being placed on the list. (Doc. No. 51, Peterson Depo. 95-96.) As a result of this
28 agreement, a sign up sheet for June 2008 training was posted between May 7, 2008 and May
21, 2008 for any eligible clerks, including Plaintiff. (Id., Peterson Depo. 96-97; Doc. No. 42,

1 A. Rodriguez Depo. Ex. 21.) It was also agreed that if any clerk then on the super cargo list
 2 failed to sign up for the training within this period, failed to complete the training after signing
 3 up, or failed to pass the super cargo test, he or she would be removed from the super cargo list.
 4 (Id., A. Rodriguez Depo. Ex. 21; Doc. No. 51, Peterson Depo. 103.)

5 Plaintiff did not sign up for the training and testing before the end of the posting on May
 6 21, 2008. (Id., Peterson Depo. 104; Doc. No. 42, A. Rodriguez Depo. Ex. 21.) As a result, on
 7 May 22, 2008, a special Joint Clerks' LRC meeting was held, where the Union and PMA,
 8 acting through Tim Peterson, voted to remove Plaintiff from the super cargo list effective May
 9 22, 2008. (Id., A. Rodriguez Depo. Ex. 21; Doc. No. 51, Peterson Depo. 101-04.) Plaintiff
 10 did not file a grievance under the PCLCD concerning his removal from the super cargo list.
 11 (Doc. No. 42, A. Rodriguez Depo. 268:11-16.)

12 Discussion

13 **I. Summary Judgment - Legal Standard**

14 Federal Rule of Civil Procedure 56 governs summary judgment. Section (b) provides
 15 that "a party against whom relief is sought may move at any time, with or without supporting
 16 affidavits, for summary judgment on all or part of the claim." FED. R. CIV. P. 56(b). A motion
 17 for summary judgment should not be granted unless the pleadings, affidavits and evidence on
 18 file present "no genuine issue as to any material fact and that the movant is entitled to
 19 judgment as a matter of law." FED. R. CIV. P. 56(c). "Summary judgment should be granted
 20 where the evidence is such that it would require a directed verdict for the moving party."
 21 Anderson v. Liberty Lobby Inc., 477 U.S. 242, 250 (1986). Thus, "Rule 56(c) mandates the
 22 entry of summary judgment ... against a party who fails to make a showing sufficient to
 23 establish the existence of an element essential to that party's case, and on which that party will
 24 bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

25 **A. Labor-Management Reporting and Disclosure Act Claims**

26 Plaintiff's first, second, third, and fourth causes of action are brought pursuant to the
 27 Labor-Management Reporting and Disclosure Act ("LRMDA"). (FAC ¶¶ 8-40.) Defendants
 28 contend that Plaintiff's first through fourth causes of actions fail because Plaintiff's 1994
 felony conviction prohibited him from lawfully serving in union office in the first place,

1 Plaintiff lacks standing to challenge the validity of a completed election, and the recall election
2 was conducted in accordance with applicable law in the Unions' constitutions.

3 Plaintiff's first three causes of action allege violations of Title I of the LMRDA, which
4 confers specific rights on labor union members. (29 U.S.C. §§ 411-415.) Section 101(a) of
5 Title I guarantees union members equal rights and privileges, freedom of speech and assembly,
6 the right to vote on due increases, protection from retaliation for initiating legal action, and due
7 process for internal union discipline. 29 U.S.C. § 411(a)(1). These guarantees may be
8 qualified by reasonable rules and regulations in the organization's constitution and bylaws.
9 Id. Section 102 provides a private right of action against the labor organization to enforce
10 section 101. 29 U.S.C. § 412.

11 **1. Plaintiff's first cause of action**

12 Plaintiff alleges a violation of 29 U.S.C. §§ 412 and 529 in his first cause of action.
13 (FAC ¶¶ 8-24.) In this claim, Plaintiff alleges that the recall petition was illegal and improper
14 under the Union's Constitution and Bylaws and that he was threatened with physical violence
15 if he did not give up his chair immediately. (Id. ¶ 11.) Plaintiff alleges that he was improperly
16 disciplined on or about December 27, 2007 by the Union because of his implementation of
17 dispatch rules and opposition to his recall when Defendants arbitrarily decided that Plaintiff
18 not be dispatched in the work rotation as a super cargo clerk. (Id. ¶ 13.) Plaintiff also alleges
19 in connection with this claim that he was inhibited from presenting a defense to his recall at
20 the January 8, 2008 membership meeting. (Id. ¶ 14.) Plaintiff also alleges that the recall
21 petition and vote were conducted improperly and that after the recall vote he continued to be
22 threatened by union members. (Id. ¶¶ 15, 19.)

23 Section 529 provides that, "[i]t shall be unlawful for any labor organization, or any
24 officer, agent, shop steward, or other representative of a labor organization, or any employee
25 thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any
26 right to which he is entitled under the provisions of this chapter." Plaintiff's first cause of
27 action seems to allege two purported incidents of suspension or discipline—the recall of
28 Plaintiff as president of Local 29 and the December 27 failure to be put in the super cargo
dispatch rotation. The parties do not dispute that Plaintiff was subject to a recall petition and

1 recall election. The only evidence presented concerning the December 27, 2007 failure to be
2 dispatched as a super cargo is Plaintiff's declaration that on that date he was denied super
3 cargo priority dispatch. (Doc. No. 51, A. Rodriguez Decl. ¶ 15.)

4 The Court concludes that Defendants are entitled to summary judgment on Plaintiff's
5 first cause of action. There is no evidence to support a claim under § 529 that Plaintiff was
6 subject to a recall petition and election because he exercised some right granted by the
7 LMRDA or that the Union initiated such recall. The evidence shows that a Union member,
8 Robert Vinole, initiated the recall process with a petition based upon members' anger over
9 Plaintiff's actions as Local 29 president. (Doc. No. 42, A. Rodriguez Depo. Ex.6.)
10 Furthermore, a recall election is not the sort of suspension or discipline covered by § 529, as
11 Plaintiff was removed from union office, not fined, suspended, expelled or otherwise
12 disciplined as a member. See Finnegan v. Leu, 456 U.S. 431, 437-38 (1982) (holding that
13 "otherwise discipline" does not include discharge from a position as an appointed union
14 employee, such as a union officer).

15 While Plaintiff may have been informally disciplined on December 27, there is no
16 evidence in the record to suggest that the Union formally disciplined Plaintiff for exercising
17 his rights under the LMRDA by not giving him super cargo priority dispatch. In using the
18 phrase "otherwise discipline," "Congress did not intend to include all acts that deterred the
19 exercise of rights protected under the LMRDA, but rather meant instead to denote only
20 punishment authorized by the union as a collective entity to enforce its rules." Breining v.
21 Sheet Metal Workers Intern. Ass'n, 493 U.S. 67, 91 (1989). Discipline in the statute refers to
22 actions taken under the color of union authority and implies action taken according to "some
23 sort of established disciplinary process rather than ad hoc retaliation by individual union
24 officers." Id. at 91-92. There is no evidence supporting an inference that Plaintiff was not
25 given super cargo priority dispatch according to some official Union action or process, as
26 Plaintiff presents no evidence on who took this action and how it was causally related to some
27 protected right under the LMRDA. Thus, Plaintiff has not made a showing sufficient to
28 establish essential elements of his claim under § 529—that the alleged disciplinary actions were
done in the name of the Union as an organizational entity and were done in response to

1 Plaintiff exercising a protected right under the LMRDA.

2 **2. Plaintiff's Second Cause of Action**

3 Plaintiff's second cause of action is brought pursuant to 29 U.S.C. §§ 411 and 529.
 4 (FAC ¶¶ 25-31.) Plaintiff alleges in this cause of action that Defendants violated §§ 411 and
 5 529 in connection with the recall election process by failing to serve Plaintiff with specific
 6 charges, failing to give him sufficient time to prepare his defense, and denying him a full and
 7 fair recorded hearing contrary to 29 U.S.C. §411(a)(5)(A), (B), and (C). (Id. ¶ 29.)

8 Section 411(a)(5) provides that, "[n]o member of any labor organization may be fined,
 9 suspended, expelled, or otherwise disciplined except for nonpayment of dues by such
 10 organization or by any officer thereof unless such member has been (A) served with written
 11 specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair
 12 hearing." 29 U.S.C. § 411(a)(5). This section, however, "does not apply to removal or
 13 suspension from union office." Grand Lodge of Intern. Ass'n of Machinists v. King, 335 F.2d
 14 340, 342-43 (9th Cir. 1964). Additionally, Plaintiff's second cause of action appears to take
 15 aim at the process by which the recall election was conducted, as Plaintiff alleges that the
 16 recall was contrary to the Union's Bylaws and Constitution. (FAC ¶ 33.) However, challenges
 17 to the validity of an election that has already been completed may only be brought under Title
 18 IV of the LMRDA. 29 U.S.C. § 483; Local 82 v. Crowley, 467 U.S. 526, 541 (1984). A union
 19 member who believes that the conduct of an election violated either the union's constitution
 20 or the statutory rules on union elections set for in the LRMDA § 401, 29 U.S.C. § 481, may
 21 only file a complaint with the Secretary of Labor. 29 U.S.C. § 482(a)(2). Accordingly, the
 22 Court concludes that Defendants are entitled to summary judgment on Plaintiff's second cause
 23 of action for a violation of § 411(a)(5), as Plaintiff's claim relates to his removal from union
 24 office through the recall process.

25 The Court concludes that Defendants are also entitled to summary judgment on
 26 Plaintiff's second cause of action for improper discipline in violation of § 529. As with §
 27 411(a)(5), § 529 has been held to not apply to the discharge of an appointed union official. See
 28 Finnegan, 456 U.S. at 437-38.

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3. Plaintiff's Third Cause of Action

Plaintiff's third cause of action is for violations of 29 U.S.C. §§ 411 and 412, alleging that the recall of Plaintiff was contrary to the Constitution and Bylaws of the Union. (FAC ¶¶ 32-36.) As discussed in relation to Plaintiff's second cause of action, § 411(a)(5)'s prohibition on fines, suspension, expulsion, or other discipline does not apply to the removal of a union official from office. Grand Lodge, 335 F.2d 342-43. Additionally, the exclusive means to challenge a completed union election is to file a complaint with the Secretary of Labor. 29 U.S.C. § 482(a)(2). Accordingly, the Court concludes that Defendants are entitled to summary judgment on Plaintiff's third cause of action.

Plaintiff argues in his opposition papers that he is not contesting the election results, but that he is claiming a violation of § 101(a)(1) for denial of equal rights at membership meetings held on November 14 and December 11, 2007. (Doc. No. 51 at 7-8.) Plaintiff contends that the physical and verbal threats aimed at him at these meetings denied him his right to participate in the meetings and present a defense to the charges against him. (Id. at 7-9.) Even under this theory, Defendants are entitled to summary judgment. While Plaintiff has provided evidence that he was threatened at the November and December 2007 meetings, he has not provided evidence that the Union, rather than individual members, prevented him from participating in the meetings or from presenting a defense. Plaintiff named five individuals who threatened him at the meetings and disrupted the December meeting to the point that as president, Plaintiff attempted to gain control and adjourn the meeting. (Doc. No. 42, A. Rodriguez Depo. 94:10-101:6, Ex. 5.) Plaintiff has not provided any evidence that the Union or an agent acting on behalf of the Union denied him equal rights at either of these meetings. 29 U.S.C. § 412. In fact, at both of the alleged meetings, Plaintiff acted as an agent of the Union in his capacity as Local 29 president. As the Supreme Court has stated, "it was the rank-and-file union members—not union officers or employees, as such—whom Congress sought to protect" in 29 U.S.C. § 411(a)(1) and (2). Finnegan, 456 U.S. at 436-37.

4. Plaintiff's Fourth Cause of Action

Plaintiff's fourth cause of action is for violations of 29 U.S.C. §§ 481 and 482, alleging that the actions of Local 29 in recalling Plaintiff were contrary to the Bylaws and Constitution

1 of Local 29 and ILWU. (FAC ¶¶ 37-40.) Pursuant to § 482, a complaint challenging an
 2 election based upon a violation of § 481, including violation of the constitution or bylaws of
 3 the labor organization pertaining to the election and removal of officers, may be filed with the
 4 Secretary of Labor. 29 U.S.C. § 482(a). The filing of a complaint with the Secretary is the
 5 exclusive remedy for challenging an election already conducted, and only the Secretary of
 6 Labor can bring suit. 29 U.S.C. § 483. Accordingly, the Court grants Defendants' motion for
 7 summary judgment on Plaintiff's fourth cause of action.

8 Because the Court concludes that Defendants are entitled to summary judgment on
 9 Plaintiff's first through fourth causes of action on other grounds, the Court need not reach the
 10 issue of whether Plaintiff's 1994 criminal conviction independently precludes these claims.

11 **B. California Common Law Claims**

12 Plaintiff's fifth, sixth, and seventh causes of action for breach of contract, breach of
 13 covenant of good faith and fair dealing, and tortious interference with economic relations arise
 14 under California common law. (FAC ¶¶ 41-47.) Plaintiff alleges that Defendants breached
 15 their contractual obligations to Plaintiff by failing to comply with the provisions of the ILWU's
 16 Constitution and Bylaws, Local 29's Constitution and Bylaws, and the PCLCD. (*Id.* ¶ 42.)
 17 Plaintiff alleges that Defendants breached the covenant of good faith and fair dealing implied
 18 in those contracts. (*Id.* ¶ 44.) Plaintiff alleges that Defendants' breach of the contracts
 19 constitute a tortious interference with an economic relationship between Plaintiff and
 20 Defendants under the CBA. (*Id.* ¶ 46.) Defendants argue they are entitled to summary
 21 judgment on these causes of action because federal labor law preempts them.

22 Section 301(a) of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185,
 23 authorizes the federal courts to hear "[s]uits for violation of contracts between an employer and
 24 a labor organization . . . or between any such labor organizations." 29 U.S.C. § 185(a). A
 25 union constitution and its bylaws is considered a contract between the union and its members,
 26 and a member or members may sue the union under § 301(a) for breach of those contracts.
 27 Wooddell v. International Bhd. of Elec. Workers, 502 U.S. 93 (1991); Ackley v. Western
 28 Conference of Teamsters, 958 F.2d 1463, 1466 (9th Cir. 1992). "[S]ection 301 preempts all
 state-law causes of action evaluation of which requires interpretation of a labor contract's

1 terms.” Hayden v. Reickerd, 957 F.2d 1506, 1508-09 (9th Cir. 1991) (internal quotation
2 omitted). This preemption includes suits based on torts “if their evaluation is inextricably
3 intertwined with consideration of the terms of a labor contract.” Id. (internal quotations
4 omitted).

5 The Court concludes that Plaintiff’s fifth, sixth, and seventh causes of action are
6 preempted by § 301. Plaintiff’s breach of contract action clearly requires the interpretation of
7 a labor contract’s terms, as Plaintiff alleges that Defendants breached the CBA and the relevant
8 Union constitutions and bylaws. Plaintiff’s breach of the covenant of good faith and fair
9 dealing action similarly requires the interpretation of a labor contract’s terms, as it depends
10 upon Plaintiff’s claim for breach of the labor contracts. See Newberry v. Pacific Racing Ass’n,
11 854 F.2d 1142, 1147 (9th Cir. 1988) (holding implied covenant of good faith and fair dealing
12 claim preempted by § 301 because plaintiff was employed under CBA and cause of action
13 required interpretation of specific language of the agreement’s terms). Plaintiff’s claim for
14 tortious interference with economic relations is also preempted, as the evaluation of Plaintiff’s
15 claim relies upon Defendants’ alleged breach of the Union constitutions and bylaws and the
16 resulting alleged interference with the economic relationship between Plaintiff and the
17 employers under the CBA. See Bale v. Gen. Tele. Co. of Cal., 795 F.2d 775, 780 (9th Cir.
18 1986) (holding state tort claims for fraud and negligent misrepresentation preempted by § 301
19 because they depended upon an analysis of the terms of an agreement made between the
20 parties in a labor contract). Therefore, this claim is inextricably intertwined with the
21 consideration of the terms in the labor contracts. Accordingly, the Court grants Defendants
22 summary judgment on Plaintiff’s fifth, sixth, and seventh causes of action.

23 Defendants also contend that Plaintiff’s state law causes of action are preempted by the
24 primary jurisdiction of the National Labor Relations Board under the doctrine established in
25 San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). (Doc. No. 41 at 22.)
26 Because the Court concludes they are preempted by § 301 and grants summary judgment on
27 that basis, the Court need not evaluate whether Plaintiff’s state law claims are also preempted
28 under Garmon.

///

C. Age Discrimination

Plaintiff's eighth cause of action is for discrimination on the basis of age in violation of California's Fair Employment and Housing Act ("FEHA") and the federal Age Discrimination in Employment Act ("ADEA"). (FAC ¶¶ 48-57.) Defendants argue that they are entitled to summary judgment on this cause of action because Plaintiff cannot establish a prima facie case of age discrimination. (Doc. No. 41 at 23.)

Under both the ADEA and FEHA it is unlawful to discharge or otherwise discriminate against an employee over 40 because of his age. 29 U.S.C. §§ 623(a), 631(a); Cal. Gov't Code §§ 12926(b), 12940(a). The age discrimination section of FEHA is closely related to its federal counterpart, the ADEA. Accordingly, "California courts interpreting FEHA often look to federal cases interpreting [the ADEA]." Nidds v. Schindler Elevator Corp., 113 F.3d 912, 916 (9th Cir. 1996).

1. Disparate Treatment Theory

Plaintiff contends that it has established a prima facie case of disparate treatment. Courts apply the McDonnell Douglas burden-shifting analysis to both ADEA and FEHA disparate treatment claims. Guz v. Bechtel Nat'l, Inc., 24 Cal.4th 317, 354 (2000); Wallis v. J.R. Simplot Co., 26 F.3d 885, 888-89 (9th Cir. 1994). Under the three-stage burden shifting test established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1993):

[A] plaintiff must first establish a prima facie case of discrimination. If the plaintiff established a prima facie case, the burden then shifts to the defendant to articulate a legitimate nondiscriminatory reason for its employment decision. Then, in order to prevail, the plaintiff must demonstrate that the employer's alleged reason for the adverse employment decision is a pretext for another motive which is discriminatory.

Wallis, 26 F.3d at 889. "The burden of persuasion remains at all times with the plaintiff." Nidds, 113 F.3d at 916-17.

In order to establish a prima facie case of age discrimination, a plaintiff may rely on direct or circumstantial evidence. Id. at 917. Here, Plaintiff may make out a prima facie case

1 of disparate treatment through evidence showing: (1) that he was a member of a protected class
2 [age 40-70]; (2) that he was performing his job in a satisfactory manner; (3) that he was
3 discharged; and (4) that he was replaced by a substantially younger employee with equal or
4 inferior qualifications. Wallis, 26 F.3d at 891. Although the prima facie burden is not
5 onerous, the plaintiff at this stage still must produce probative evidence giving rise to a
6 reasonable inference of discrimination. Nidds, 113 F.3d at 917.

7 The Court concludes that Plaintiff fails to make out a prima facie case of age
8 discrimination by Defendants under a disparate treatment theory. Although not disputed by
9 Defendants that Plaintiff is part of the protected class, Plaintiff has not produced any evidence
10 that he was performing his job in a satisfactory manner or that he was replaced by a
11 substantially younger employee with equal or inferior qualifications. Plaintiff has not
12 produced probative evidence that he was performing his job in a satisfactory manner, as he was
13 required to take job-specific training and pass a job-specific test in order to remain on the super
14 cargo list, but failed to sign up for the training and testing within the required time period.
15 (Doc. No. 42, A. Rodriguez Depo. 239-41, Ex. 21.)

16 Additionally, Plaintiff has not produced probative evidence that he was replaced, much
17 less by a substantially younger employee with equal or inferior qualifications. When asked
18 if anyone younger than Plaintiff was put on the super cargo list after he was taken off, Plaintiff
19 testified, "Younger. No one else." (Id. 268:24-269:3.) The only indication in the record that
20 another super cargo was added is Plaintiff's testimony that Noel Carlisle was placed on the
21 super cargo list after attending a week of the super cargo training. (Id. 268-69.) This evidence
22 fails to establish a prima facie case of age discrimination, as Plaintiff fails to make a sufficient
23 showing on an essential element of his claim—that he was replaced by someone substantially
24 younger with equal or inferior qualifications. There is no evidence concerning Noel Carlisle's
25 age and the only evidence on Carlisle's qualifications is that she attended the super cargo
26 training that Plaintiff did not sign up for or attend. There is no evidence to suggest that age
27 was considered in the decisions to require the training and testing and remove Plaintiff when
28 he failed to sign up for the required training and testing. (See id. 250:11-25 (testifying that no
one from Local 29, PMA, or the dispatcher ever indicated that Plaintiff was removed from the

1 super cargo list because of his age).) Accordingly, the Court grants Defendants' motion for
 2 summary judgment on Plaintiff's eighth cause of action for age discrimination under a
 3 disparate treatment theory.

4 **2. Disparate Impact Theory**

5 Plaintiff also argues in his opposition that he has established a prima facie case of age
 6 discrimination under a disparate impact theory. (Doc. No. 51 at 18-20.) In a disparate impact
 7 case, a plaintiff must make a prima facie showing that an employment practice or criterion has
 8 a significant adverse impact on a protected classification. See Rose v. Wells Fargo & Co., 902
 9 F.2d 1417, 1424 (9th Cir. 1990); Antonio v. Wards Cove Packing Co., Inc., 810 F.2d 1477,
 10 1482 (9th Cir. 1987). In order to establish a prima facie case of disparate impact, the plaintiff
 11 must: (1) identify the specific employment practices or selection criteria being challenged; (2)
 12 show disparate impact; and (3) prove causation; "that is, the plaintiff must offer statistical
 13 evidence of a kind and degree sufficient to show that the practice in question has caused the
 14 exclusion of applicants for jobs or promotions because of their membership in a protected
 15 group." Id. at 1424 (citation omitted). Plaintiff has made no showing or presented any
 16 evidence that the required super cargo testing and training had a significant adverse impact on
 17 workers over 40 years old. Plaintiff has offered no statistics on the age of those who have
 18 taken and passed the training and testing in relation to those eligible to take and pass the
 19 training nor that any statistical disparity was caused by the challenged practice. See Watson
 20 v. Fort Worth Bank and Trust, 487 U.S. 977, 95 (1988) (stating that statistical disparities "must
 21 be sufficiently substantial that they raise such an inference of causation). Plaintiff has made
 22 no showing of how the facially neutral policy of the Union to require the training and testing
 23 significantly and adversely impacts the protected classification of workers over 40.
 24 Accordingly, the Court grants Defendants' motion for summary judgment on Plaintiff's eighth
 25 cause of action under a disparate impact theory.

26 **D. Retaliation**

27 Plaintiff's ninth cause of action is for retaliation. (FAC ¶¶ 58-63.) Plaintiff does not
 28 specify in his FAC whether he is stating a claim under state or federal law for retaliation. As
 such, the Court will evaluate his cause of action under both state and federal law. The ADEA

1 and FEHA prohibit employers from retaliating against employees who have made complaints
 2 or otherwise opposed age discrimination. 29 U.S.C. § 623(d); Cal. Gov't Code § 12940(h).
 3 Retaliation claims are subject to the same three-part McDonnell Douglas analysis as other
 4 discrimination claims. Manatt v. Bank of America, 339 F.3d 792, 800 (9th Cir. 2003).

5 **1. Prima Facie Case**

6 To establish a prima facie case of retaliation, a plaintiff must prove that: (1) the plaintiff
 7 engaged in a protected activity; (2) the plaintiff suffered an adverse employment action; and
 8 (3) there was a causal link between the plaintiff's protected activity and the adverse
 9 employment action. Poland v. Chertoff, 494 F.3d 1174, 1179-80 (9th Cir. 2007); McRae v.
 10 Dept. of Corrections and Rehabilitation, 142 Cal.App.4th 377, 386 (2006). In order to
 11 establish a causal link between protected activity and an adverse employment action, a plaintiff
 12 must provide evidence showing that the plaintiff's employer was aware that the plaintiff had
 13 engaged in the protected activity. Morgan v. Regents of Univ. of Calif., 88 Cal.App. 4th 52,
 14 70 (2000).

15 The Court concludes that Plaintiff fails to establish a prima facie case of retaliation.
 16 Plaintiff has produced no evidence that he engaged in a protected activity prior to his removal
 17 from the super cargo list on May 22, 2008, such as filing age discrimination complaints with
 18 Local 29 or ILWU or making any alleged additional verbal age discrimination complaints
 19 concerning attempts to take away his super cargo status based on his failure to take and pass
 20 super cargo training. (See FAC ¶ 59.) Plaintiff stated in his deposition that he never filed a
 21 grievance with the LRC and never filed a complaint with the Union regarding being taken off
 22 the super cargo list. (Doc. No. 42, A. Rodriguez Depo. 268:11-16.) Additionally, Plaintiff has
 23 produced no evidence that Local 29 or ILWU had knowledge of any of the alleged age
 24 discrimination complaints. The only evidence that Plaintiff complained of being taken off the
 25 super cargo list is one email sent by Plaintiff's attorney in March 2008 stating that pursuing
 26 Carlisle's grievance would be considered discriminatory and retaliatory and two letters sent
 27 by Plaintiff's attorney after Plaintiff's removal on May 30, 2008 and September 2, 2008. (Doc.
 28 No. 51, Ex. G; Doc. No. 42, A. Rodriguez Depo.. Exs. 22 & 23.) The March email does not
 mention age discrimination and refers to the "previously alleged harassment, discrimination,

and retaliation.” (Doc. No. 51, Ex. G.) The only evidence of allegations of discrimination, harassment, and retaliation prior to March 2008 concern Plaintiff’s complaints about the recall election and members’ threats against Plaintiff. (See Doc. No. 51, Ex. C; Doc. No. 42, A. Rodriguez Depo. Ex. 13.) Therefore, Plaintiff fails to establish that he engaged in a protected activity of filing age discrimination complaints that was causally related to the adverse employment action. Accordingly, the Court grants Defendants’ motion for summary judgment on Plaintiff’s ninth cause of action, as Plaintiff fails to establish a prima facie case of retaliation.

E. Breach of Collective Bargaining Agreement

Plaintiff’s tenth cause of action is for a breach of the collective bargaining agreement, embodied in the PCLCD, brought pursuant to § 301 of the Labor-Management Relations Act (“LMRA”), 29 U.S.C. § 185. (FAC ¶¶ 64-70.) Defendants argue they are entitled to summary judgment on this cause of action because Local 29 and ILWU did not breach their duties of fair representation, removal of Plaintiff from super cargo status did not violate the CBA, and Plaintiff failed to exhaust his remedies under the contract. (Doc. No. 41 at 15-20.)

Plaintiff alleges in his tenth cause of action that Defendants ILWU and Local 29 breached their duty of fair representation to Plaintiff and that Defendants breached the PCLCD. (FAC ¶¶ 67-68.) Therefore, this suit is a hybrid fair representation/§ 301 suit, requiring proof that the Unions breached their duty of fair representation and that Plaintiff’s removal from the super cargo list after he failed to sign up for and attend super cargo training and testing violated his rights under the PCLCD. See Bliesner v. Comm’n Workers of Am., 464 F.3d 910, 913 (9th Cir. 2006) (citing DelCostello v. Int’l Bhd. of Teamsters, 462 U.S. 151, 164-65 (1983)). District courts may resolve these two potentially dispositive questions in the order it prefers. Id. at 914.

1. Breach of PCLCD

Plaintiff alleges that the denial of Plaintiff’s seniority acquired through training, payroll, and work history and the blocking of Plaintiff from the super cargo dispatch rotation are breaches of the PCLCD. (FAC ¶ 66.) Defendants contend that PMA followed its contracts in adding and removing Plaintiff from the super cargo list and that Plaintiff has not and cannot

1 identify any portion of the PCLCD that has been breached by the determinations made by the
 2 JPLRC concerning the requirements and criteria for remaining on the super cargo list after the
 3 past practice of Local 29 was brought to light. (Doc. No. 41 at 16-17.) There is no dispute that
 4 PMA allowed Plaintiff to join the super cargo list in September 2007 pursuant to the agreement
 5 with Local 29 to add three marine clerks to the list based on seniority. (Doc. No. 42, A.
 6 Rodriguez Depo. Ex. 19.) Also, there is no dispute that PMA agreed with Local 29 to remove
 7 any clerk on the super cargo list if they failed to take and pass the super cargo training posted
 8 for sign up in May 2008. (Id. Ex. 21.) PMA removed Plaintiff after he failed to sign up for
 9 the required testing and training. (Id. Ex. 21; Doc. No. 51, Peterson Depo. 95-96, 103-04.)
 10 Therefore, the Court concludes that PMA adhered to the contracts it made with Local 29
 11 regarding the addition of clerks to the super cargo list and removal of clerks from the super
 12 cargo list. Plaintiff has not submitted any evidence showing that PMA breached its contracts
 13 with Local 29 regarding the agreements on adding and removing clerks from the super cargo
 14 list, including evidence showing that the modification of requirements for inclusion on the
 15 super cargo list breached a provision of the collective bargaining agreement.

16 Plaintiff alleges in his FAC, without submitting any evidence to support this allegation,
 17 that, “the denial of plaintiff’s seniority acquired through training, payroll, and work history and
 18 the blocking of plaintiff from the super cargo dispatch rotation are breaches of the PCLCD and
 19 deny plaintiff his right to equal treatment by defendants contrary to the PCLCD and the
 20 LMRA.” (FAC ¶ 66.) However, “[e]mployee seniority rights are not ‘vested’ property rights
 21 which lie beyond the reach of subsequent union-employer negotiations conducted in the course
 22 of their evolving bargaining relationship.” Hass v. Darigold Dairy Products Co., 751 F.2d
 23 1096, 1099 (9th Cir. 1985). Plaintiff fails to point to or submit any provision of the PCLCD
 24 that was breached and fails to show how PMA breached its contracts by negotiating with Local
 25 29 regarding who may attain super cargo status in the course of their evolving bargaining
 26 relationship. (See Doc. No. 51, Peterson Depo. 91, 104.) Plaintiff offers no argument
 27 concerning the breach of the CBA in his opposition papers. (Doc. No. 51.)

28 **2. Plaintiff’s Exhaustion of Contractual Remedies**

Additionally, Defendants contend that Plaintiff failed to exhaust his contractual

1 remedies for contesting his removal from the super cargo list. (Doc. No. 41 at 17.) As a
2 general rule, individuals working under a collective bargaining agreement must first exhaust
3 contractual grievance procedures before bringing an action for breach of that agreement. Carr
4 v. Pacific Maritime Ass'n, 904 F.2d 1313, 1317 (9th Cir. 1990). "Failure to utilize the
5 grievance procedures, or to invoke them in a timely manner, bars grievants from pursuing
6 remedies in court. [internal citations omitted]. At a minimum, therefore, members of the
7 bargaining unit must first turn to the grievance procedures for a remedy." Id. (citation omitted).

8 The Court concludes that Plaintiff has not made a sufficient showing that he exhausted
9 his contractual remedies. Plaintiff argues that his attorney filed a grievance that was not
10 answered and that a grievance was not required because it would have been futile. (Doc. No.
11 51 at 13-14.) Although an employee must attempt to exhaust exclusive grievance and
12 arbitration procedures of the CBA, an employee may be excused from exhausting contractual
13 remedial procedures when the conduct of the employer amounts to a repudiation of those
14 procedures or if the union has the sole power under the contract to invoke the higher stages of
15 the grievance procedure, such that the employee has been prevented from exhausting his
16 contractual remedies by the union's wrongful refusal to process the grievance. Vaca v. Sipes,
17 386 U.S. 171, 185 (1967). "[T]he wrongfully discharged employee may bring an action
18 against his employer in the face of a defense based upon the failure to exhaust contractual
19 remedies, provided the employee can prove that the union as bargaining agent breached its
20 duty of fair representation in its handling of the employee's grievance." Id. at 186.

21 Plaintiff stated in his deposition that he never filed a grievance with the LRC and never
22 filed a complaint with the Union regarding being taken off the super cargo dispatch list. (Doc.
23 No. 42, A. Rodriguez Depo. 268:11-16.) Plaintiff has not submitted any evidence that he did
24 exhaust his contractual remedies for the alleged age discrimination and retaliation by
25 Defendants. The letter sent by Plaintiff's attorney on May 30, 2008 is not a union grievance
26 and does not state that it is acting as such. (Doc. No. 42, A. Rodriguez Depo. Ex. 22.) The
27 letter sent by Plaintiff's attorney on September 2, 2008 references complaints made by Plaintiff
28 to members and officers of Local 29 and representatives of PMA regarding Plaintiff's removal
from the super cargo list. (Id. Ex. 23.) However, Plaintiff testified that he never filed a Union

1 complaint. (*Id.* 268:11-16.) Plaintiff has not provided the Court with any evidence that these
 2 attorney letters fit within the CBA's grievance procedures. Tim Peterson, PMA's
 3 representative at the JPLRC when Plaintiff was added to and removed from the super cargo
 4 list, testified that, "our procedures aren't to have lawyers send letters to our JPLRC. We don't
 5 respond to letters from lawyers. . . . [W]e have complaints, we have employer complaints and
 6 Union complaints that our JPLRC adjudicates." (Doc. No. 51, Peterson Depo. 109:3-12.)
 7 Thus, the only evidence of the proper procedure to use to file a grievance with the JPLRC is
 8 to use a Union complaint. Plaintiff was aware of this procedure, as shown by his Union
 9 complaints in November and December of 2007 regarding the threats made against him. (Doc.
 10 No. 51, A. Rodriguez Depo. Ex. 5.) Accordingly, the Court concludes that Plaintiff fails to
 11 sufficiently show that he exhausted his contractual remedies or why he should be excused from
 12 such exhaustion.

13 **3. Breach of Duty of Fair Representation**

14 A union's duty of fair representation prohibits discriminatory and bad faith conduct
 15 while protecting unions' "discretion to act in what they perceive to be their members' best
 16 interests." *Galindo v. Stoodly*, 793 F.2d 1502, 1514 (9th Cir. 1986). "To establish a breach of
 17 a union's duty of fair representation, an employee must show that the union's conduct was
 18 'arbitrary, discriminatory, or in bad faith.'" *Id.* at 1513 (*quoting Vaca*, 386 U.S. at 190). "In
 19 the grievance context, this standard prohibits a union from ignoring a meritorious grievance
 20 or processing that grievance perfunctorily. [citation omitted]. A union, however, need not
 21 process a meritless grievance." *Id.* at 1513 (citation omitted). "Because the union must
 22 balance many collective and individual interests when it decides whether and to what extent
 23 to pursue a particular grievance, courts should accord substantial deference to the union's
 24 decisions." *Dutristic v. Caterpillar Tractor Co.*, 749 F.2d 1270, 1273 (9th Cir.1983).

25 From the face of Plaintiff's FAC, it is unclear on what grounds he alleges that
 26 Defendants breached their duty of fair representation. (*See* FAC ¶ 67.) However, Plaintiff
 27 argues in his opposition that Defendants breached their duty of fair representation by pursuing
 28 Noel Carlisle's late grievance and that the Defendants' actions in requiring training and testing
 did not benefit the collective interest. (Doc. No. 51 at 12-13.) The Court concludes that

1 Plaintiff's claim of breach of duty of fair representation based on the Defendants' processing
2 of Carlisle's grievance fails. "[A] local union's reliance on precedent [is] not a discriminatory
3 act and [does] not constitute bad faith." Stevens v. Moore Business Forms, Inc., 18 F.3d 1443,
4 1448 (9th Cir. 1994). The evidence offered shows that Carlisle's grievance concerning how
5 Plaintiff, his brother, and another marine clerk were added to the super cargo list in September
6 2007 was meritorious. The JPLRC was presented with evidence that those on the super cargo
7 list prior to the addition of Plaintiff were required to take super cargo training and pass a super
8 cargo test. (Doc. No. 42, A. Rodriguez Depo. Ex. 21.) Thus the Union had a duty to
9 investigate and process the meritorious grievance, even if filed late. See Galindo, 793 F.2d at
10 1513; see also Dutristic, 749 F.2d at 1274 (holding arbitrator's dismissal of grievance as
11 untimely could constitute breach of union's duty).

12 In processing the grievance in the JPLRC meetings, the Union and PMA agreed that any
13 member currently on the super cargo list or any clerk who sought addition to the list must
14 complete training and testing, as was the past practice in Local 29. (Doc. No. 42, A. Rodriguez
15 Depo. Ex. 21.) Therefore, the Union's agreements concerning super cargo status were made
16 according to established precedent and were not discriminatory or done in bad faith. The
17 evidence shows that Plaintiff had the same opportunity as other members to be placed on the
18 super cargo list, but failed to complete the training and testing. Plaintiff fails to show how he
19 was treated in a discriminatory manner. See Amalgamated Ass'n of St. Elec. & Motor Coach
20 Employees of Am. v. Lockridge, 403 U.S. 274, 301 (1971) (noting to establish union's
21 judgment was discriminatory, there needs to be "substantial evidence of discrimination that is
22 intentional, severe, and unrelated to legitimate union objectives"). Plaintiff also does not show
23 how the Union's actions were an improper exercise of its discretion "to make such concessions
24 and accept such advantages as, in light of all relevant considerations, they believe will best
25 serve the interests of the parties represented." Ford Motor Co. v. Huffman, 345 U.S. 330, 335
26 (1953).

27 Plaintiff also argues that Defendants breached their duty of fair representation in their
28 alleged actions of age discrimination and retaliation. (Doc. No. 51 at 12-13.) Plaintiff has
failed to make a prima facie showing of age discrimination and retaliation. Therefore, he has

1 not made a showing sufficient to establish a breach of the duty of fair representation under a
2 theory of age discrimination and retaliation.

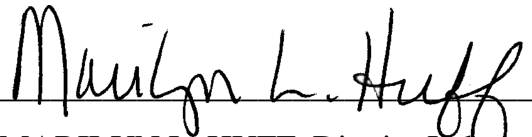
3 The Court grants Defendants' motion for summary judgment on Plaintiff's hybrid duty
4 of fair representation/§ 301 tenth cause of action, as Plaintiff has produced no evidence
5 showing the CBA was breached, that he exhausted his contractual remedies, and that the Union
6 breached its duty of fair representation.

7 **Conclusion**

8 For the reasons set forth above, the Court GRANTS Defendant Local 29 and ILWU's
9 motion for summary judgment on all causes of action.

10 **IT IS SO ORDERED.**

11 DATED: August 18, 2009

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13 MARILYN L. HUFF, District Judge
14 UNITED STATES DISTRICT COURT
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